

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 29, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

NICHOLAS J. KLOEPFEL,

Defendant.

NO: 2:08-CR-154-RMP-1

ORDER DENYING MOTION FOR
COMPASSIONATE RELEASE

BEFORE THE COURT is Defendant Nicholas J. Kloepfel's Construed Motion for Compassionate Release, ECF No. 93. The Court has reviewed Defendant's pro se motion, the supplemental briefing and exhibits submitted on behalf of Mr. Kloepfel by counsel from the Federal Defenders of Eastern Washington, and the United States' response to Defendant's motions. After considering the applicable factors provided in 18 U.S.C. § 3553(a) and the applicable policy statements issued by the United States Sentencing Commission, the Court finds that compassionate release is not supported by the facts of this case.

BACKGROUND

On June 23, 2009, Defendant Kloepfel pleaded guilty to one count of possession with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine and one count of possession with the intent to

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1 distribute. ECF No. 57. Defendant was sentenced to a term of incarceration of
2 195 months, to run concurrently, on each of his two counts of conviction, and the
3 Court dismissed the remaining counts of the Superseding Indictment. *See* ECF No.
4 81. The Court imposed enhancements for Defendant's behavior on arrest and for
5 carrying a firearm during the offense.

6 Defendant is 37 years old and currently is incarcerated at United States
7 Penitentiary ("USP") Florence in Colorado. United States Bureau of Prisons
8 ("BOP") records indicates an anticipated release date of January 29, 2023.
9 Defendant has a long criminal history that involves violent conduct. Defendant
10 incurred infractions during approximately the first two years of his term of
11 incarceration, but has not had any disciplinary problems in prison since 2012.
12 Defendant also has participated in self-improvement and reentry programming
13 through the BOP since 2012.

14 Medical records provided by the Assistant Federal Defender support that
15 Defendant has chronic asthma that has required treatment with an albuterol inhaler
16 during Defendant's incarceration, and Defendant has coughed up blood while
17 incarcerated after exposure to pepper spray. ECF No. 110 at 8. During a chronic
18 care visit on August 23, 2020, medical staff assessed Defendant as "high risk if he
19 acquires coronavirus." *Id.*

20 According to the Government, as of December 7, 2020, the Bureau of
21 Prisons case tracking website indicated thirty confirmed cases in the inmate
population at USP-Florence. ECF No. 115 at 12.

1 Defendant proposes release to the home of his fiancée in Spokane and
 2 represents that he has a job waiting for him at a construction firm.

3 **LEGAL STANDARD**

4 A court may reduce a term of imprisonment on compassionate release grounds
 5 after considering the factors under 18 U.S.C. § 3553(a) to the extent that they are
 6 applicable and upon a finding that “extraordinary and compelling reasons warrant
 7 such a reduction” and the reduction is “consistent with applicable policy statements
 8 issued by the Sentencing Commission[.]” 18 U.S.C. § 3582(c)(1)(A).

9 The U.S. Sentencing Commission has issued a policy statement recognizing
 10 certain circumstances as “extraordinary and compelling reasons” for purposes of
 11 compassionate release, so long as “the defendant is not a danger to the safety of any
 12 other person or to the community, as provided in 18 U.S.C. § 3142(g)”:

13 (A) Medical Condition of the Defendant.—

14 (i) The defendant is suffering from a terminal illness (i.e., a
 15 serious physical and advanced illness with an end of life
 16 trajectory)

17 (ii) The defendant is—

18 (I) suffering from a serious physical or medical condition,

19 (II) suffering from a serious functional or cognitive
 20 impairment, or

21 (III) experiencing deteriorating physical or mental health
 because of the aging process,

that ‘substantially diminishes the ability of the
 defendant to provide self-care within the environment
 of a correctional facility and from which he or she is
 not expected to recover.’

(B) Age of the Defendant.—The defendant (i) is at least 65 years old;

(ii) is experiencing a serious deterioration in physical or mental
 health because of the aging process; and (iii) has served at least 10
 years or 75 percent of his or her term of imprisonment, whichever
 is less.

1 (C)Family Circumstances—

- 2 (i) The death or incapacitation of the caregiver of the
defendant's minor child or minor children.
- 3 (ii) The incapacitation of the defendant's spouse or registered
partner when the defendant would be the only available
caregiver for the spouse or registered partner.

4 (D)Other Reasons—As determined by the Director of the Bureau of
Prisons, there exists in the defendant's case an extraordinary and
5 compelling reason other than, or in combination with, the reasons
described in subdivisions (A) through (C).

6 U.S. Sentencing Guidelines Manual ("USSG") § 1B1.13.

7
8 Until December 21, 2018, the Court could reduce a term of imprisonment for
extraordinary and compelling reasons only upon motion by the Director of the BOP.
9
10 Following enactment of the First Step Act, a federal prisoner may move on his own
behalf for a sentence reduction and compassionate release after exhausting all
11 administrative appeals. 18 U.S.C. § 3582(c)(1)(A). Section 1B1.13, USSG, has not
12 been updated since enactment of the First Step Act.¹

13
14 Relief under 18 U.S.C. § 3582(c)(1)(A) is available only after a defendant
has fully exhausted all administrative rights to appeal a failure of the BOP to bring
15 a motion on the defendant's behalf or the lapse of 30 days from the warden's
16 receipt of Defendant's request for compassionate release, whichever is earlier.
17
18 18 U.S.C. § 3582(c)(1)(A).

19 **DISCUSSION**

20 _____

21 ¹ The Court takes judicial notice that as of the date of this Order, there are an
insufficient number of confirmed commissioners to comprise a quorum for
purposes of amending the USSG.

1 Exhaustion

2 Defendant represents that he has exhausted administrative remedies by
3 requesting compassionate release from the Complex Warden and appealing the
4 denial of his request. ECF No. 31 at 4. The Government agrees that Defendant's
5 request for compassionate release is ripe for judicial review. ECF No. 115 at 10.
6 Defendant first sought compassionate release on April 15, 2020, from the Warden
7 at USP-Florence, and the Warden denied the request on April 24, 2020. ECF No.
8 110 at 5–6. Defendant subsequently appealed the denial within BOP. *Id.* The
9 Court finds that there are no further avenues of relief for Defendant to exhaust at
10 the agency level and concludes that he has satisfied the exhaustion requirement of
11 18 U.S.C. § 3582(c)(1)(A).

12 Home Confinement

13 As a preliminary matter in addressing the merits of Defendant's motions for
14 relief, the Court notes that Defendant seeks to "have the custodial portion of his
15 sentence converted to home confinement to ensure his safety." *See* ECF No. 105
16 at 13. Under Section 12003(b)(2) of the Coronavirus Aid, Relief, and Economic
17 Security Act ("CARES Act") (Mar. 27, 2020), if the Attorney General finds that
18 emergency conditions will materially affect the functioning of the BOP, the BOP is
19 permitted to lengthen the maximum amount of time the Director may place a
20 prisoner in home confinement under 18 U.S.C. § 3452(c)(2). *See also Wilson v.*
21 *Ponce*, Case No. CV 20-4451-MWF (MRWx), 2020 U.S. Dist. LEXIS 104571,
*20–21 (C.D. Cal. Jun. 8, 2020). However, as this Court and other district courts

1 have recognized, the CARES Act authorized the BOP alone, not the courts, to
2 expand the use of home confinement during the pandemic. *See United States v.*
3 *Adams*, Case No. 18-cr-19-RMP-2, 2020 U.S. Dist. LEXIS 160462, at *3 (Sept. 2,
4 2020); *Smith v. Blankensee*, Case No. CV 20-4642-JVS (JEM), 2020 U.S. Dist.
5 LEXIS 136623, at *5–6 (C.D. Cal. Jul. 2, 2020). This Court lacks jurisdiction to
6 order home confinement. *See Lewis v. Jacquez*, Case No. 20-cv-1146-RSM-BAT,
7 2020 U.S. Dist. LEXIS 196252, at *7–8 (W.D. Wash. Sept. 29, 2020); *Blankensee*,
8 2020 U.S. Dist. LEXIS 136623, at *5–6.

9 Accordingly, the Court considers only whether the Defendant qualifies and
10 presents sufficient justification for compassionate release under 18 U.S.C. § 3582(c).

11 Extraordinary and Compelling Reasons

12 Defendant is eligible for release only if he can demonstrate that he has
13 “extraordinary and compelling” circumstances that would justify compassionate
14 release in light of both 18 U.S.C. § 3582(c) and 18 U.S.C. § 3553(a), which the
15 United States Sentencing Commission directs courts to consider. USSG § 1B1.13.

16 Defendant asserts that his chronic asthma makes him susceptible to
17 complications were he to become ill with COVID-19. ECF No. 105 at 8–9. The
18 Government agrees that Defendant’s chronic asthma and other respiratory illness
19 constitutes extraordinary and compelling reasons based on a “serious physical or
20 medical condition” under USSG § 1B1.13. 1(A)(ii)(I). ECF No. 115 at 11.

21 However, the Government argues that the Court should consider that Defendant
would also be exposed to the possibility of contracting COVID-19 were he to be

1 released to Spokane County, where community transmission is widespread. ECF No.
2 115 at 12–13.

3 The Court agrees that Defendant has substantiated that his chronic asthma
4 constitutes a serious physical or medical condition from which Defendant is currently
5 suffering. However, the Court further agrees with the Government that Defendant is
6 susceptible to complications whether he is exposed to the virus that causes COVID-
7 19 in or out of custody, and there is not firm support in the record for Defendant
8 having a better ability to manage his chronic asthma if released to the community
9 during the pandemic.

10 Section 3553(a) Factors

11 The Court further considers the factors set forth in 18 U.S.C. § 3553(a) and
12 finds that they weigh against compassionate release for Defendant, especially “the
13 nature and circumstances of the offense and the history and characteristics of the
14 defendant.” 18 U.S.C. § 3553(a)(1). Defendant’s instant convictions are for
15 distribution of methamphetamine into the community, and in being arrested after
16 Defendant led law enforcement on a dangerous, high-speed chase and while he had a
17 firearm with him in his vehicle. *See* ECF No. 115 at 13. By the time of his
18 sentencing at age 26, Defendant already had reached a Criminal History Category VI
19 as a result of criminal activity ranging from misdemeanors to violent felonies,
20 including assault and robbery.

21 The Court encourages Defendant to persist with engaging in the rehabilitative
programming that is available to him and to continue to abstain from behavior that

1 would result in further infractions while he is incarcerated. *See* 18 U.S.C. §
2 3553(a)(2)(C). However, Defendant's recent efforts toward peaceful, law-abiding
3 behavior do not yet overcome the violent nature of Defendant's criminal history and
4 the circumstances of his instant offenses, which caution against early release from his
5 sentence. *See* 18 U.S.C. § 3142(g). Rather, the Court concludes that Defendant
6 presents a continuing risk of danger to the community and that this conclusion
7 precludes his release. Therefore, the Court concludes that the section 3553(a) factors
8 weigh against granting Defendant compassionate release under the circumstances
9 presented in his motion.

10 Accordingly, having considered all of the factors required by USSG § 1B1.13,
11 as well as those set forth in 18 U.S.C. § 3553(a), **IT IS HEREBY ORDERED** that
12 Defendant's Motion for Compassionate Release, **ECF No. 93**, is **DENIED**.

13 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order
14 and provide copies to counsel and to the U.S. Probation Office.

15 **DATED** December 29, 2020.

16
17 *s/ Rosanna Malouf Peterson*
18 ROSANNA MALOUF PETERSON
19 United States District Judge
20
21